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**United States  
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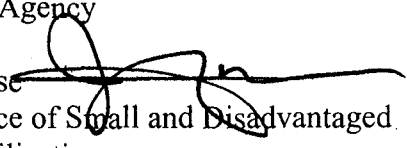
Office of Small  
and Disadvantaged  
Business Utilization

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**TO:** Eric Forman  
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**FROM:** James E. House   
Director, Office of Small and Disadvantaged  
Business Utilization

**SUBJECT:** Comments on Proposed Rule Pertaining to Agricultural Commodities

We appreciate the opportunity to comment on the proposed rule to change USDA's regulations governing the purchase of agricultural commodities. One proposed change would prohibit USDA from applying the Historically Underutilized Business Zone (HUBZone) price evaluation preference when evaluating bids from contractors that obtain the commodity in substantially the final form in which it is to be supplied to the Government. Another change would permit farmer-owned cooperatives to participate in small business, 8(a), HUBZone and Service Disabled Veteran Owned Small Business (SDVOSB) and Javits-Wagner-O'Day (JWOD) set-asides.

We would like to make some overall policy comments prior to conducting a more detailed review. First, a similar proposed rule had been introduced previously in the Department and there have been numerous discussions about most of the same issues. The Office of Small and Disadvantaged Business Utilization (OSDBU), the Office of Procurement and Property Management (OPPM) and the Small Business Administration (SBA) were involved in the previous discussions, and all should be included in the initial stages of the resurrection of the issues. All pertinent parties should be provided copies of the proposal and be allotted sufficient time to review and comment.

Second, these proposed changes impact programs for which the SBA and the Committee For Purchase From People Who Are Blind or Severely Disabled (the Committee) have policy jurisdiction.

While we recognize that the Agricultural Marketing Service (AMS) and the Farm Service Agency (FSA) have responsibility for developing regulations which impact their programs, we must acknowledge that these proposed changes will significantly alter the administration of small business and JWOD programs in the Department.

We see conflicting laws and regulations. Small business set-asides (and the various subsets such as 8(a), HUBZone, etc.) and JWOD purchases are mandated by law and regulation. The purchase of selected items included in the JWOD Program takes priority over small business procurement programs. The provision in P. L. 106-387 regarding farmer-owned cooperatives appears to be in conflict with the statutory requirements in the Small Business and JWOD Acts. Federal Acquisition Regulation, Part 19.5, stipulates the order of precedence for Federal procurements and specifies mandatory sources and set-aside priorities. There are questions of jurisdiction and questions of which Federal entity should promulgate the regulations.

Our third general comment concerns the determination that the proposed rule would not have a significant economic impact on a substantial number of small businesses under the Initial Regulatory Flexibility Analysis. We question this conclusion if small business set-asides are eliminated in the buying activities or if the set-asides are limited because a farmer-owned cooperative may decide to participate in the bid.

The following are a few additional comments concerning the Proposed Rule:

- The Small Disadvantaged Business Program (SDBP) is referenced several times in the Rule. There is currently no SDB set-aside and the provision for an SDB price evaluation adjustment has expired. Therefore, the SDBP would not have an impact on this regulation and should not be included.
- Under the 8(a) set-aside description, the role of the Director of USDA's OSDBU is not correct. Every major buying activity makes its own determination for the use of an appropriate set-aside for each requirement. OSDBU makes recommendations for set-asides and reviews requirements (over the simplified acquisition threshold) that have not been set-aside.
- Under "Special Provisions for USDA Commodity Purchases", the tiered pricing schedule to implement the HUBZone price evaluation preference is not complete. There is a different system for the price evaluation preference for the purchase of agricultural commodities by the Secretary for export operations through international food aid programs.

- Defining “substantially final form”, was part of initial discussions with the SBA which issued an Advanced Notice of Proposed Rulemaking (ANPR) covering this topic. We are very interested in determining the responses derived from the ANPR and would be willing to take the lead in tracking the progress of that project.

This Proposed Rule covers several diverse issues which impact the food commodity programs in USDA. We might want to consider addressing some topics separately in order to advance them through the process more quickly.

There are additional smaller changes and corrections to the document which our staff would be happy to discuss. Please keep us informed of the progress of this Rule and let us know if we can assist you further.

cc: Russ Ashworth  
Director, Office of Procurement and Property Management